

Pursuant to Ind.Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JOEL M. SCHUMM
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

OSCAR SEGURA,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 49A02-0612-CR-1139

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan Goodman, Judge
Cause No. 49F15-0608-FD-144103

July 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Oscar Segura (“Segura”) appeals his conviction for escape. Segura contends that the trial court abused its discretion by refusing to give his tendered final jury instruction that incorporated Article I, § 19 of the Indiana Constitution, which provides, “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.” Because Segura’s tendered instruction was a correct statement of law and because the instructions given by the trial court were not sufficient to inform the jury of its constitutional right to determine the law, we find that the trial court abused its discretion by refusing to give Segura’s tendered instruction. We reverse and remand.

Facts and Procedural History

On August 4, 2006, the State charged Segura with escape.¹ The State later added an allegation that Segura is a habitual offender. At the jury trial on the escape charge, Segura tendered the following final jury instruction: “The Indiana Constitution provides that in all criminal trials, the jury shall have the right to determine the law and the facts.” Appellant’s App. p. 52. However, the trial court refused Segura’s tendered instruction and instead instructed the jury, “You must determine the facts from a consideration of all the evidence and look to these instructions from the Court for the law and find your verdicts accordingly.” *Id.* at 68. The jury found Segura guilty of escape, and Segura then agreed to plead guilty to being a habitual offender. Segura now appeals.

Discussion and Decision

Segura’s sole contention on appeal is that the trial court abused its discretion by

¹ Ind. Code § 35-44-3-5.

refusing to give his final jury instruction that incorporated Article I, § 19 of the Indiana Constitution, which provides, “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”² The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading it and to enable the jury to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003). Jury instruction is reviewed for an abuse of discretion. *Id.* at 1163-64. A trial court abuses its discretion by refusing to give a tendered instruction if: (1) the tendered instruction correctly sets out the law, (2) evidence supports the tendered instruction, and (3) the substance of the tendered instruction is not covered by other instructions. *Id.* at 1164.

Here, the trial abused its discretion by not giving Segura’s tendered instruction to the jury. First, Segura’s proffered instruction was extracted verbatim from Article I, § 19 of the Indiana Constitution. It is therefore axiomatic that Segura’s instruction correctly set out the law. Second, we agree with Segura that “because this was a criminal case, the instruction is supported by the evidence in the record.” Appellant’s Br. p. 4. Third, Segura’s proffered instruction was not covered in substance by other instructions. The trial court instructed the jury to “look to these instructions from the Court for the law.”

² The State argues:

Segura has waived his instructional error claim for appeal by failing to raise a timely objection. [Segura] did not object when the trial court issued its decision rejecting the proposed instruction. [Segura] did not object when the trial court read the final instructions to the jury. Because Segura did not raise a timely objection to the rejection of his proposed instruction, the Court should not consider his claims.

Appellee’s Br. p. 5-6. The State relies on *Clay v. State*, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002), for the proposition that “failure to object to an instruction at trial results in waiver of the issue on appeal.” *Id.* at 5. However, the State’s reliance on *Clay* is misplaced because Segura is not appealing the jury instruction given at trial. Rather, he is appealing the trial court’s refusal to give his tendered instruction.

Appellant's App. p. 68. However, Article I, § 19 of the Indiana Constitution plainly provides that "the jury shall have the right to determine the law." Thus, the trial court's instruction did not completely inform the jury of its right to determine the law.

Finally, the State argues that even if the trial court erred in rejecting Segura's tendered instruction, any such error was harmless because of the substantial evidence against Segura. We disagree. In *Warren v. State*, the Indiana Supreme Court held "that when a defendant requests the trial court to instruct the jury on its role as finders of law and fact during the habitual offender phase of a trial, it is *reversible error* for the trial court to refuse the request." 725 N.E.2d 828, 837 (Ind. 2000) (emphasis added). Although we are considering the guilt phase of the trial here, rather than the habitual offender phase, "there is no sound basis for distinguishing between the right to seek a Section 19 instruction during a habitual offender phase and the right to seek it during final instructions of a guilt phase." *Bridges v. State*, 835 N.E.2d 482, 483 (Ind. 2005) (discussing *Warren*, 725 N.E.2d at 837). "A defendant is entitled to have a proper Section 19 instruction presented to the jury in both preliminary and final instructions." *Id.* at 483. As such, we find that the trial court committed reversible error by refusing Segura's tendered instruction. We therefore reverse both Segura's conviction for escape and the habitual offender finding, and we remand for further proceedings consistent with this opinion.

Reversed and remanded.

SULLIVAN, J., and ROBB, J. concur.